

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)

Qwest Communications International, Inc.)
Consolidated Application for Authority)
To Provide In-Region InterLATA Services in)
Colorado, Idaho, Iowa, Nebraska and)
North Dakota)

WC Docket No. 02-148

**OPPOSITION OF NEW EDGE NETWORK, INC.
D/B/A NEW EDGE NETWORKS**

New Edge Network, Inc. (“New Edge Networks”) respectfully submits its opposition to Qwest Communications International, Inc. (“Qwest”) joint application for authorization to provide in-region, interLATA service in the States of Colorado, Idaho, Iowa, Nebraska and North Dakota, pursuant to section 271 of the Communications Act of 1934, as amended (the “Act”).¹

New Edge Networks has collocated equipment with Qwest in all five States for which Qwest is seeking authority to provide in-region interLATA services. New Edge Networks provides competitive digital subscriber line (“DSL”), asynchronous transfer mode (“ATM”) and frame relay services through a combination of its own facilities, unbundled network elements, tariffed services and resale. New Edge Networks is dependent upon the appropriate implementation and enforcement of the resale and unbundling obligations contained in the Act to deliver competitive telecommunications services to customers.

¹ 47 U.S.C. § 271.

I. INTRODUCTION

New Edge Networks believes that Qwest's application to provide in-region interLATA services in Colorado, Idaho, Iowa, Nebraska and North Dakota must be denied. New Edge Networks' opposition to Qwest's application is based on its operational experience with Qwest and its understanding of Qwest's actions in the telecommunications market. More specifically, New Edge Networks will show the Commission that Qwest is in violation of the following competitive checklist items in section 271:

1. Checklist Item 271(c)(2)(B)(ii) - Nondiscriminatory access to network elements in accordance with the requirements of section 251(c)(3) and 252(d)(1); and
2. Checklist Item 271(c)(2)(B)(xiv) - Telecommunications services are available for resale in accordance with the requirements of sections 251(c)(4) and 252(d)(3).

In addition, Qwest is already providing in-region interLATA services in violation of section 271 of the Act. As such, New Edge Networks believes that Qwest must fully divest itself of all in-region interLATA services prior to the Commission approving any application for 271 authority.

II. CHECKLIST ITEM 271(c)(2)(B)(ii) - QWEST DOES NOT PROVIDE NONDISCRIMINATORY ACCESS TO NETWORK ELEMENTS IN ACCORDANCE WITH SECTIONS 251(c)(3) AND 252(d)(1) OF THE ACT

Section 271(c)(2)(B)(ii) of the Act requires Qwest to provide nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1). Section 251(c)(3) places the following obligation on Qwest:

The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technical feasible point on rates, terms and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252. An incumbent local exchange carrier shall provide such unbundled network elements in a

manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.²

New Edge Networks is aware of a number of significant instances where Qwest does not provide access to network elements on rates, terms and conditions that are just, reasonable and nondiscriminatory.

The first example pertains to the secret agreement that Qwest entered into with a competitive local exchange carrier. The agreement is considered secret because Qwest purposely did not file the agreement for approval with the appropriate State public utility commissions. Although there are numerous examples of such secret agreements, New Edge Networks will focus the Commission's attention on the terms and conditions in one specific secret agreement. In that secret agreement, Qwest provides the competitive local exchange carrier with a ten (10) percent discount on all billed services including unbundled network elements, collocation and tariffed services in exchange for consulting services provided by the competitive local exchange carrier.³ As a result of this agreement not being filed with the appropriate State public utility commission, New Edge Networks was unable to adopt a similar arrangement with Qwest pursuant to section 252(i).⁴ Qwest was also unwilling to amend its interconnection agreement with New Edge Networks to provide for similar terms and conditions. The result is that New Edge Networks pays ten (10) percent more than a competitor for an identical network elements and services from Qwest. As such, Qwest is in violation of the nondiscriminatory provisions of section 251(c)(3) and the filing requirements of section 252(e)(1) of the Act.⁵

² 47 U.S.C. § 251.

³ The agreement between Qwest and the competitive local exchange carrier is not state specific. Therefore, the competitive local exchange carrier will receive the benefit of the ten (10) percent rebate in any State it wishes to enter, including Colorado, Idaho, Iowa, Nebraska and North Dakota.

⁴ Section 252(i) requires a local exchange carrier to make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

⁵ Section 252(e)(1) requires any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission.

Again, this is just one example of the numerous secret agreements that Qwest entered into with a variety of carriers. Another Qwest secret agreement provided for a special Qwest provisioning team to be on site of the competitive provider with direct access to Qwest's OSS systems. This type of secret agreement calls into question the results of Qwest's OSS testing and performance results. For example, if the wholesale performance results include data submitted by Qwest personnel on behalf of a competitive provider then these results are likely to be more favorable than what the competitive provider would have experienced without the Qwest personnel on site.⁶

Another example of Qwest's discriminatory behavior pertains to the provisioning of services for its retail customers versus that of its wholesale customers. Specifically, New Edge Networks was initially informed that Qwest could not provision IDSL capable loops over facilities with integrated pair gain equipment. This information was supported by the fact that New Edge Networks received reject notices for orders where the underlying facilities utilized integrated pair gain equipment. Recently, however, a potential customer notified New Edge Networks that Qwest had contacted him and said that Qwest could provide IDSL service over loops utilizing integrated pair gain equipment. The Qwest account manager assigned to New Edge Networks continued to maintain that Qwest could not provision IDSL capable loops over facilities utilizing integrated pair gain equipment. It was only upon further investigation by different Qwest personnel that New Edge Networks was informed that Qwest could provision IDSL capable loops over facilities using integrated pair gain equipment. New Edge Networks pushed Qwest for additional information only to discover that Qwest's retail division had been able to provide IDSL services over facilities with integrated pair gain since the first day the company started offering the IDSL service.

In defense of its actions, Qwest maintained that it never told New Edge Networks not to submit orders where the prequal information indicated the customer was served by facilities with integrated pair gain equipment. Qwest also asserted that the issue had been addressed in the 271 workshop proceedings in Colorado. Our review of those proceedings, however, indicate that Qwest continued to assert during the workshops that it was incapable of provisioning IDSL

⁶ Other requirements required competitive providers to refrain from objecting to Qwest's 271 applications. As such, it is unclear whether or not the Commission will get a complete picture of Qwest's operational deficiencies in this proceeding.

capable loops over facilities with integrated pair equipment.⁷ This example illustrates how Qwest discriminates between its wholesale and retail customers.

A third example of Qwest's discriminatory behavior pertains to the company's provisioning of DSL services to Internet service providers ("ISP"). Although Qwest maintains that it provides DSL services to ISPs pursuant to its FCC tariff, it is obvious that one large ISP is clearly getting preferential and discriminatory treatment. Specifically, Qwest's FCC tariff requires that carriers and ISPs reselling Qwest's DSL services must purchase Qwest DSL Host Service in all LATAs where the customer subscribes to Qwest DSL Service and must deal directly with its end users and be solely liable with respect to all matters relating to the service, including marketing, ordering, technical support, billing and collections.⁸ Qwest readily admits in FCC Docket WC 02-77, however, that the company is providing one ISP with marketing, billing and collocation services on behalf of the ISP.⁹ Furthermore, New Edge Networks strongly believes, and asserted in FCC Docket WC 02-77, that Qwest has not required the same ISP to purchase Qwest DSL Host Service in all LATAs where the customer subscribes to Qwest DSL Service. The reason Qwest did not require the ISP to establish an ATM connection in each LATA is because Qwest is providing the ISP with in-region interLATA services.

A couple of additional examples illustrates that some of Qwest's rates contained in its Statement of Generally Available Terms and Conditions ("SGAT") are not just and reasonable. The first pricing example compares Qwest's rates for providing a Quote Preparation Fee ("QPF") when a competitive provider submits a collocation application in the States of Colorado, Idaho, Iowa, Nebraska and North Dakota. The main purpose of the example is to show that some of Qwest's QPF rates are not within a zone of reasonableness. However, the example also shows Qwest's ability to obfuscate what competitive carriers will actually pay for services from Qwest.

⁷ The affidavit of Penny Bewick, which is attached to comments filed by CompTel in this proceeding, provides a more complete description of the events surrounding the IDSL issue.

⁸ Qwest Corporation, Tariff FCC No. 1, Section 8.4.4.A.2.

⁹ In the Matter of Petition of Qwest Corporation for Declaratory Ruling Clarifying that the Wholesale DSL Services Qwest Provides MSN are Not "Retail" Services Subject to Resale Under Section 251(c)(4) of the Act, Petition for Declaratory Ruling, WC 02-77.

In the State of Colorado, Qwest charges a QPF of \$2,111.27 for each collocation application submitted by a competitive local exchange carrier.¹⁰ The QPF is the same regardless of whether or not the application is for cageless, caged or virtual collocation. In addition, there is a separate and lower QPF of \$1,055.50 associated with a collocation augment. This reflects the lower planning and engineering costs associated with an augment as opposed to new construction. Finally, pursuant to the Colorado SGAT the QPF paid by the competitive carrier is eventually credited to the final space construction charge for the collocation job in order to avoid double recovery of the same work. As stated in Qwest's Colorado SGAT:

The preliminary engineering and planning costs are included in the caged and cageless space construction charges. These engineering and planning charges are also included in the caged and cageless quote preparation fees. Upon completion of the collocation construction, these quote preparation fees will be credited to the final space construction charge for the collocation job.¹¹

Although the rates in Colorado are not ideal from New Edge Networks perspective, these collocation rates form a good basis to determine whether or not Qwest's collocation rates in the other states are just and reasonable.

In the State of Idaho, Qwest is proposing different QPF rates depending upon the type of collocation desired.¹² The QPF proposed under the title "All Collocation" is \$2,125.92. However, the QPF for "Cageless Physical Collocation" is \$4,575.97, and the QPF for "Caged Physical Collocation" is \$4,912.95. New Edge Networks is not aware of how Qwest determines when the QPF for "All Collocation" applies versus the QPF for a "Cageless Physical Collocation". Experience tells us, however, that Qwest will apply the higher QPF rate for cageless collocation if New Edge Networks adopts Qwest's SGAT for the State of Idaho. In addition, no separate augment QPF is provided, nor does Qwest state that the QPF will be credited to the final space construction charge as in Colorado.

¹⁰ Qwest Colorado SGAT Exhibit A, Amended June 7, 2002, pg. 2 of 17.

¹¹ Qwest Colorado SGAT Exhibit A, Amended June 7, 2002, footnote 10.

¹² Qwest Idaho SGAT Exhibit A, Amended May 31, 2002.

In the State of Iowa, the QPF for “All Collocation” is \$1,573.68.¹³ Qwest’s SGAT contains an identical rate for “Cageless Physical Collocation” and “Caged Physical Collocation”. While these rates appear more reasonable than the rates in Idaho, Qwest does not provide a separate augment QPF nor does Qwest state that the QPF will be credited to the final space construction charge.

In the State of Nebraska, Qwest does not provide a QPF for “All Collocation”. However, the QPF for “Virtual Collocation” is \$4,372.02.¹⁴ For “Cageless Physical Collocation” and “Caged Physical Collocation” the QPFs are \$4,981.81 and \$4,753.66, respectively. Once again, Qwest does not provide for a separate augment QPF, nor does Qwest state that the QPF will be credited to the final space construction charge.

In the State of North Dakota, the QPF for “All Collocation” is \$1,684.80.¹⁵ However, Qwest is proposing to charge a QPF of \$4,626.54 for “Caged Physical Collocation” and \$4,981.81 for “Cageless Physical Collocation”. As in all the other States other than Colorado, Qwest is not proposing a separate augment QPF, nor does Qwest state that the QPF will be credited to the final space construction charge.

The purpose of New Edge Networks addressing the QPF is to point out to the Commission that Qwest’s QPFs are not only unjust and unreasonable in some cases, but also confusing. For example, what is the distinction between the QPF for “All Collocation” versus the QPF for “Cageless Physical Collocation” and which rate element applies? In addition, why should the costs associated with a QPF range from \$1,573.68 in Iowa for all types of collocation to \$4,981.81 in North Dakota for cageless collocation? Surely, the planning and engineering costs associated with preparing a quote for collocation cannot be three (3) times higher in North Dakota and Nebraska as they are in Iowa. Moreover, Colorado is the only State where Qwest specifically states that the QPF will be credited to the final space construction charge. This means that Qwest will double recover the planning and engineering costs in the States of Idaho, Iowa, Nebraska and North Dakota. And finally, separate QPFs for augments should be required

¹³ Qwest Iowa SGAT Exhibit A, March 26, 2002.

¹⁴ Qwest Nebraska SGAT Exhibit A, January 25, 2002.

¹⁵ Qwest North Dakota SGAT Exhibit A, March 15, 2002.

since the underlying costs for planning and engineering an augment are significantly less than the planning and engineering expenses associated with a new build out.

Another example pertains to Qwest's pricing for unbundled dedicated interoffice transport ("UDIT"). New Edge Networks orders UDITs from Qwest in order to connect New Edge Networks equipment collocated in Qwest's central offices.¹⁶ A comparison of the UDIT rates filed in Qwest's SGATs indicates that the UDIT rates in Idaho and Iowa are significantly higher than the UDIT rates in the other States. Table 1 below contains the rates as listed in Qwest's most recent SGAT filing:

Table 1.

Monthly Recurring Rates						
Unbundled Dedicated Interoffice Transport						
DS1 UDIT	Colorado		Idaho		Iowa	
	Fixed	Per Mile	Fixed	Per Mile	Fixed	Per Mile
- Over 0 to 8 Miles	\$26.76	\$1.27	\$36.43	\$54.07	\$190.29	\$0.00
- Over 8 to 25 Miles	\$26.52	\$1.23	\$37.26	\$16.78	\$190.29	\$0.00
- Over 25 to 50 Miles	\$27.05	\$0.87	\$39.12	\$21.34	\$190.29	\$0.00
- Over 50 Miles	\$27.63	\$0.73	\$37.77	\$14.83	\$190.29	\$0.00
DS1 UDIT	Nebraska		North Dakota			
	Fixed	Per Mile	Fixed	Per Mile		
- Over 0 to 8 Miles	\$36.45	\$3.46	\$42.03	\$3.84		
- Over 8 to 25 Miles	\$37.33	\$3.49	\$42.99	\$3.86		
- Over 25 to 50 Miles	\$39.31	\$1.98	\$45.14	\$2.14		
- Over 50 Miles	\$37.86	\$0.84	\$43.58	\$0.93		
DS3 UDIT	Colorado		Idaho		Iowa	
	Fixed	Per Mile	Fixed	Per Mile	Fixed	Per Mile
- Over 0 to 8 Miles	\$173.55	\$37.95	\$238.61	\$54.07	\$5,328.09	\$0.00
- Over 8 to 25 Miles	\$176.21	\$14.89	\$242.03	\$16.78	\$5,328.09	\$0.00
- Over 25 to 50 Miles	\$162.20	\$17.80	\$223.90	\$21.34	\$5,328.09	\$0.00
- Over 50 Miles	\$170.78	\$12.15	\$235.64	\$14.83	\$5,328.09	\$0.00
DS3 UDIT	Nebraska		North Dakota			
	Fixed	Per Mile	Fixed	Per Mile		
- Over 0 to 8 Miles	\$234.16	\$58.33	\$275.29	\$64.92		
- Over 8 to 25 Miles	\$237.16	\$18.44	\$279.23	\$21.28		
- Over 25 to 50 Miles	\$218.68	\$22.86	\$258.29	\$25.57		
- Over 50 Miles	\$231.14	\$15.83	\$271.86	\$17.62		

¹⁶ It is important to note that there is rarely a competitive alternative for interoffice transport services in the markets served by New Edge Networks.

Using the rates contained in Table 1, a ten (10) mile DS1 UDIT, for example, will cost New Edge Networks \$38.79 in Colorado, \$72.23 in Nebraska, \$81.59 in North Dakota, \$190.29 in Iowa and \$205.06 in Idaho. A ten (10) mile DS3 UDIT will cost \$325.14 in Colorado, \$409.83 in Idaho, \$421.56 in Nebraska, \$492.03 in North Dakota and \$5,328.09 in Iowa.

What this type of comparison shows is that the DS1 UDIT rates in Idaho and Iowa are clearly out of any zone of reasonableness. In Idaho, for example, the per-mile DS1 UDIT rates are the same as the per-mile DS3 UDIT rates. The result is that the DS1 UDIT rates in Idaho are the highest of the five states and over five (5) times higher than the rates in Colorado and two and a half (2.5) times higher than the rates in Nebraska and North Dakota.

In Iowa, the non-mileage sensitive DS1 and DS3 UDIT rates results in significantly higher rates than the other states, with the exception Idaho's DS1 UDIT rates. Thus, a ten (10) mile DS3 UDIT in Iowa costs over sixteen (16) times more in Iowa than Colorado and over ten (10) times higher than the rates in Idaho, Nebraska and North Dakota. Of course the flat-rated rate structure makes the comparison difficult because obviously an example can be provided where the rates would be cheaper in Iowa than anywhere else. However, these rates should be mileage sensitive to reflect their true incremental costs. If not, then Qwest is stating that the cost to provide a ten (10) mile DS1 or DS3 UDIT is the same as the cost of providing a two hundred (200) mile DS1 or DS3 UDIT. Clearly, this cannot be the case.

In summary, Qwest does not offer access to network elements on rates, terms and conditions that are just, reasonable and nondiscriminatory. Qwest has purposely discriminated between competitive providers with respect to the rates, terms and conditions by which it offers services. Qwest also discriminates against competitive providers by providing its retail division with more accurate information than its wholesale division. In addition, Qwest discriminates in its provisioning of DSL services between ISPs. And finally, certain rates proposed by Qwest are clearly unreasonable. For these reasons, Qwest has not complied with the section 271(c)(2)(B)(ii).

III. CHECKLIST ITEM 271(c)(2)(B)(xiv) – NOT ALL OF QWEST’S TELECOMMUNICATIONS SERVICES ARE AVAILABLE FOR RESALE IN ACCORDANCE WITH THE REQUIREMENTS OF SECTIONS 251(c)(4) AND 252(d)(3)

Pursuant to section 271(c)(2)(B)(xiv) Qwest must make telecommunications services available for resale in accordance with the requirements of sections 251(c)(4) and 252(d)(3). Basically, section 251(c)(4) requires Qwest to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on the resale of such telecommunications service. Section 252(d)(3) provides the basis for how the State commissions determine the applicable wholesale rate.

At issue for New Edge Networks and Qwest’s application for 271 authority is Qwest’s continued unwillingness to offer for resale at wholesale rates certain ATM and frame relay services purchased by New Edge Networks for resale purposes. This has been an on-going and lengthy debate between New Edge Networks and Qwest. Initially, Qwest denied that it was required to offer at wholesale rates any interstate ATM and frame relay services. Qwest’s argued that these services were already wholesale services and therefore no avoided cost discount, or wholesale rate, should apply. Qwest also argued that the services were jurisdictionally interstate and therefore not subject to the resale requirements in the Act. Eventually, Qwest conceded and agreed with New Edge Networks that these services are subject to the resale requirements in the Act. As New Edge Networks proceeded with implementing this change of policy, however, Qwest modified its position and now claims that certain services are not subject to resale at an avoided cost discount. Specifically, Qwest asserts that the wholesale rate is not applicable to the Stand Alone Access Link and Network-to-Network Interface. Qwest is now claiming that these services are “administrative services” and therefore not subject to any wholesale discount.

Section 251(c)(4) of the Act states that Qwest’s resale obligation pertains to any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers. Importantly, there is no distinction in Qwest’s FCC tariff between

wholesale and retail rates for these services. Furthermore, subscribers who are not telecommunications carriers can, and do, order the services directly from Qwest. Therefore, Qwest is violating section 251(c)(4) of the Act. As such, Qwest is also violating section 271(c)(2)(B)(xiv) of the Act.

IV. QWEST IS ALREADY PROVIDING IN-REGION INTERLATA SERVICES IN VIOLATION OF SECTION 271 OF THE ACT

As stated previously, Qwest has entered into an agreement with a large ISP for the provisioning of DSL services to the ISP on terms and conditions other than those contained in Qwest's FCC tariff. In addition to the fact that Qwest is providing this ISP with services outside the scope of Qwest's FCC tariff, it is also clear that Qwest is providing interLATA service to this ISP in violation of section 271. Specifically, Qwest's FCC tariff requires all ISPs purchasing Qwest's DSL services to establish an ATM connection within each LATA served by the ISP. This requirement is necessary so that Qwest does not violate any interLATA restrictions. In short, Qwest hands off the traffic to the ISP who in turn routes the traffic to its aggregation points using interexchange carriers to route the traffic across LATAs. It is evident, however, that Qwest did not require this ISP to establish an ATM connection within each LATA served. Thus, not only is Qwest in violation of the terms of its FCC tariff and discriminating against other Internet service providers, but it is also providing interLATA services in violation of the section 271 of the Act. New Edge Networks brought this issue to the Commission's attention in WC Docket No. 02-77.¹⁷ Qwest's only response was that these "allegations are as irrelevant as they are substantively groundless."¹⁸ Surely Qwest's violation of section 271 interLATA restrictions is relevant in this proceeding. Furthermore, New Edge Networks explained how easy it would be for the Commission to confirm New Edge Networks' assertions that Qwest was violating both its FCC tariff and the interLATA restrictions. If New Edge Networks' assertions are groundless, then Qwest should have no problem clarifying why they are groundless.

¹⁷ Reply Comments of New Edge Networks, WC Docket 02-77, May 30, 2002, pgs. 2-3.

¹⁸ Reply Comments of Qwest Corporation in Support of Petition for Declaratory Ruling, WC Docket No. 02-77, May 30, 2002, pg. 4.

New Edge Networks is aware of a Commission complaint filed against Qwest regarding the company's violation of the interLATA restrictions.¹⁹ In addition, New Edge Networks is aware of the results of audits filed with the Commission regarding Qwest's compliance with the merger requirements and section 271. The Commission must address the issues raised in the complaint and the merger audits prior to granting Qwest 271 approval. To do otherwise would signal to other incumbent local exchange carriers that they are free to disregard sections of the Act and the Commission's own rules in order to achieve their own business goals. It would also signal to competitive providers that the Commission has no real desire to enforce the pro-competitive provisions of the Act.

V. CONCLUSION

Qwest is not providing nondiscriminatory access to network elements and services at just and reasonable rates. In addition, Qwest is not offering for resale at wholesale rates certain telecommunications services that it provides at retail to subscribers who are not telecommunications carriers. Finally, Qwest is in violation of section 271 because it is currently providing in-region interLATA telecommunications services. Until these issues are resolved, Qwest's application to provide in-region interLATA services in Colorado, Idaho, Iowa, Nebraska and North Dakota must be denied.

Respectfully Submitted,

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July 3, 2002

¹⁹ Complaint, Touch America, Inc. v. Qwest Communications International, Inc. File No. EB-02-MD-003 and File No. EB-02-MD-004, revised and refiled March 1, 2002.